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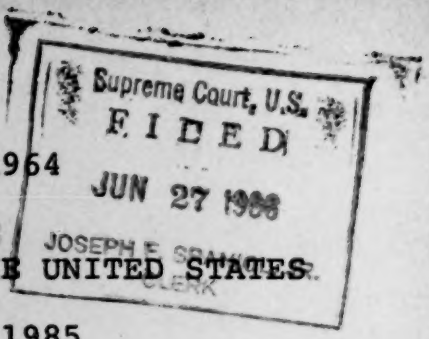

NO. 85-1964

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER, 1985

AMERICAN HOSPITAL ASSOCIATION, et al.,

Plaintiffs-Petitioners,

v.

DAVID K. HEYDINGER, M.D.,
Director of the West Virginia
Department of Health,

Defendant-Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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NO. 85-1964

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

AMERICAN HOSPITAL ASSOCIATION,
WEST VIRGINIA HOSPITAL ASSOCIATION;
STONEWALL JACKSON MEMORIAL HOSPITAL
COMPANY; CHARLES TOWN GENERAL HOSPITAL;
WEIRTON MEDICAL CENTER, INC.;
SISTERSVILLE GENERAL HOSPITAL;
WHEELING HOSPITAL, INC.; and
THE CATHOLIC HEALTH ASSOCIATION OF
THE UNITED STATES,

Plaintiffs-Petitioners,

v.

DAVID K. HEYDINGER, M.D.,
Director of the West Virginia
Department of Health,

Defendant-Respondent.

BRIEF IN OPPOSITION TO THE
PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

STATEMENT OF THE CASE

This is a petition for certiorari from a per curiam affirmance by the Fourth Circuit of a trial court's decision upholding a statute of the State of West Virginia from constitutional attack by the petitioners, inter alia, upon grounds that the challenged statute violated rights protected by the United States Constitution. The statute in question, West Virginia Code § 16-5B-6a, requires the boards of directors of nonprofit and local governmental hospitals to be composed of 40 percent of members from certain categories. The categories specified in the statute are small business, organized labor, the elderly, and low-income persons. Petitioners contend that West Virginia Code 16-5B-6a violates their First Amendment rights. The

statement of the case supplied by the petitioners is improper in that it incorporates conclusions of law and fact not supported by the record along with arguments which should be placed in the appropriate portion of the petition.

David K. Heydinger, M.D., Director of the West Virginia Department of Health, Defendant-Respondent, hereby petitions this Court not to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

SUMMARY OF THE ARGUMENT

1. West Virginia Code § 16-5B-6a provides that 40 percent of the members on the boards of directors of nonprofit hospitals and local government owned

hospitals must be representative of four consumer categories: small businesses, organized labor, the elderly, and persons whose income is less than the national median income Nowhere on the face of this statute does it place any restrictions on the boards' freedom of speech. The boards are not required to place persons on these boards whose views are in opposition to theirs. Further, they are not forced to do battle in the public arena on issues in which they would prefer to remain silent. The statute in question does not hamper corporate free speech, but rather provides a means by which hospitals may become more aware of their respective communities' needs.

2. The West Virginia statute does not unnecessarily infringe upon the

freedom of association rights possessed by the boards of directors of nonprofit and local government hospitals. The law does not force hospital boards to associate with those whom they would rather not associate with, but instead requires that they be more sensitive to those groups with whom they have some associational contact already. Therefore, this statute is not associational in nature and does not violate the First Amendment's right to freedom of association. The hospitals in question are still free to pick and choose persons who best fulfill their required qualifications.

3. This Court has acknowledged as a general rule that issues not raised in the courts below cannot now be raised for the first time. There are a few exceptions, however, such as the Court

may permit the raising of new issues if there have been exceptional circumstances or if there has been a substantial intervening change in the law. The case at bar neither addresses any exceptional circumstances nor does it address any substantial intervening changes in the law. Therefore, the petitioners have effectively waived any rights to raising a new issue at this time.

ARGUMENT

I.

WEST VIRGINIA CODE § 16-5B-6a DOES NOT RAISE A FIRST AMENDMENT FREEDOM OF SPEECH ISSUE.

West Virginia Code § 16-5B-6a is not a statute designed to restrict nor does it restrict the freedom of speech rights possessed by the board of directors of privately owned nonprofit

hospitals and local government hospitals. The statute's purpose is to control the ever-rising costs of health care in West Virginia by requiring that hospitals be more cognizant of their communities' needs by having boards of directors that are representative of the communities they serve. In order to implement this policy, the Legislature has mandated that at least forty percent of the board members of the affected hospitals be representative of the following four major consumer categories: small businesses, organized labor, elderly persons, and persons whose income is less than the national median income. The idea is that by requiring broader community participation in health care planning the increase in hospital costs will be retarded.

The petitioners posit that the statute restrains the exercise of free speech by the board of directors of subject hospitals. No restraint of speech is obvious on the face of the statute. It, by its terms, neither requires or prohibits any speech. Petitioners make no argument that there is a restraint of speech on the face of the statute. Absent any apparent restraint of speech on the face of the statute, the petitioners attempt to manufacture a restraint on speech.

This manufactured restraint requires that the assumptions made by petitioners respecting board members qualifying and designated as representative of the four groups must be accepted as immutable laws of nature. The petitioners assume, albeit sub silentio,

that a representative board member must and will hold views antagonistic to the board of directors. (The corollary assumption to this is that all boards of directors are ideological monoliths that never have a dissenting voice among the membership.) Thus, the petitioners would have the Court believe that by being required to associate with board members representative of the various groups designated in the statute, the board will be forced to be a platform for the views of these representative members which are always and necessarily repugnant and antagonistic to the views of the remaining majority of the board.

The petitioners ask the Court to accept as an article of faith that the posited restraint of speech would thus occur. But, beyond this appeal to

faith, the petitioners make no attempt to explain how freedom of speech will be impaired. Petitioners have attempted to blur the distinction between freedom of speech and freedom of association in an effort to link this case with the recent decision of this Court in Pacific Gas & Electric Company v. Public Utilities Commission of California, 54 U.S.L.W. 4149 (U.S. February 27, 1986). That case clearly dealt with freedom of speech; the instant case does not. In Pacific Gas & Electric, the appellant contested a state utility commission's order, which required Pacific Gas & Electric to put in its billing envelopes printed material espousing views diametrically opposed to the views of Pacific Gas & Electric. This printed material came from organizations that

actually opposed Pacific Gas & Electric in proceedings before the utility commission. The forced inclusion of the printed material in the billing envelopes had the direct effect of hampering Pacific Gas & Electric's free speech.

By contrast, the case at bar involves no requirement that any speech occur. The hospital boards of directors are free to remain absolutely silent if they wish. Unlike the utility commission's order in Pacific Gas & Electric, supra, nothing in West Virginia Code § 16-5B-6a requires hospitals to identify themselves with opposing viewpoints.

The petitioners raise the fear that designated board members must and will hold dissenting viewpoints from those held by the nondesignated members. There is nothing in the statute at issue

that requires or suggests that the members of a board of directors designated as representative of various segments of the community must hold any viewpoint, let alone a viewpoint diametrically opposed to the viewpoint of the nondesignated board members. There is no language in West Virginia Code § 16-5B-6a that requires that hospital boards of directors must be forums for opposing views. Additionally, it cannot be gainsaid that nondesignated board members may very well become hectoring dissenters from the views of the majority. Absent the requirements of the statute, the petitioners cannot distinguish the effect of dissent by a nondesignated board member from dissent by a designated board member. Under petitioners'

argument any dissent is a restraint on free speech.

Additionally, it may well be that individuals who qualify for these designations as consumer representatives for the enumerated classes, namely elderly, small business, labor, and low-income, are presently sitting on the boards of hospitals. Thus, compliance with this law might not require any change in the existing composition of the boards of the affected hospitals.

If, in fact, one or more categories are not already filled and more board members must be added to comply with the law, the selection of those additional board members will be accomplished by each individual hospital board itself. These consumer representatives will be interviewed, nominated and elected in

accordance with hospital bylaws. They will not be chosen and forced on the hospital by the state or any labor union or consumer group. The hospitals are free to choose a new board member, if one is needed, to satisfy the low-income requirement, for example, by choosing a low-income person whose views comport with or are identical to those of the other members of the board.

It is clear that the decision in Pacific Gas & Electric, supra, on which petitioners rely heavily, is entirely distinguishable from the case at bar. No West Virginia hospital will be required to disseminate the ideas of opponents in their billing envelopes, nor will they be forced to associate themselves before the public with the ideas of other organizations or contrary

viewpoints. The hospitals will only be required to have board members, of their own choosing, meeting certain criteria that are "idea-neutral" or "content-neutral." The West Virginia statute, thus, does not offend the ruling of this Court in Pacific Gas & Electric, supra.

As the trial court in the instant case noted, "[t]he Act does not require Catholic hospitals to alter their Creed or beliefs, nor does it prevent them from excluding individuals with ideologies or philosophies different from those of its existing members." American Hospital Association v. Hansbarger, 600 F. Supp. 465, 475 (N.D. W. Va. 1984).

On the other hand, if this Court finds that the West Virginia statute envisions input from different

perspectives, this does not offend the free-speech rights of the corporation. As was noted in Pacific Gas & Electric, "the critical considerations were that the state sought to abridge speech that the First Amendment is designed to protect, and that such prohibitions limited the range of information and ideas to which the public is exposed." (Emphasis added) Pacific Gas & Electric, 54 U.S.L.W. 4149 at 4154 citing First National Bank of Boston v. Bellotti, 435 U.S. 765 at 776-778, 781-783 (1978); Consolidated Edison Co. v. Public Service Comm'n of N.Y., 447 U.S. 530 at 533-535 (1980). West Virginia Code § 16-5B-6a does not restrain the affected hospital boards of directors from dispensing information to the public. In fact, by requiring that at least a

certain percentage of the board members be representative of certain consumer categories, the West Virginia statute is encouraging the exchange of ideas that this Court has found to be a vital element of the First Amendment.

Additionally, respondent notes that, unlike the utility commission order at issue in Pacific Gas & Electric, supra, the statute challenged herein in no way encourages the involvement of hospitals, or their boards, in controversial public issues which they would not otherwise have faced. The effect of this law is not to create controversy, but to make hospitals more aware of their respective community's needs.

II.

PETITIONERS DO NOT OBJECT TO ASSOCIATING WITH INDIVIDUALS MEETING THE REQUIREMENTS OF THE WEST VIRGINIA STATUTE AND, THEREFORE, NO RIGHT OF FREEDOM OF ASSOCIATION IS IMPLICATED BY THE STATUTE.

As mentioned above, the petitioners have confused freedom of speech and freedom of association. While this Court used language in Pacific Gas & Electric, 54 U.S.L.W. at 4154, that "forced association" with potentially conflicting views "burdens free speech," there is a difference between a corporation forced to associate itself in public with opposing views and a hospital board required to associate at a board meeting with individuals, of their own choosing, who meet certain qualifications.

Part I of this Argument pointed out that the West Virginia statute will have

no effect on the hospitals' freedom of speech. While the case at bar is not a case that affects freedom of speech, petitioners indirectly argue that it is a case which affects freedom of association. Petitioners face significant obstacles to prevailing on a freedom of association theory.

The most recent freedom of association case is Roberts v. United States Jaycees, 104 S. Ct. 3244 (1984), in which this Court held that it did not illegally infringe on the Jaycees freedom of association for a state law to compel the Jaycees to accept women as regular members. It was a fundamental tenet of the Jaycee creed that the organization's regular membership was to be exclusively male. The Jaycees specifically and vigorously objected to the state law based

attempt to require association with women members.

Unlike the appellants in the Jaycees case, petitioners herein do not object to associating with individuals who are members of the categories set forth in Code 16-5B-6a. As the trial court noted in the case sub judice:

> "Indeed, testimony revealed that the plaintiffs do not exclude members of the categories set forth in the Act and that some board members of Catholic Hospitals qualify in at least one or more categories set forth in the statute. * * *" American Hospital Assoc., 600 F. Supp. at 475.

In Jaycees the petitioners designated themselves as a male group: the exclusion of women from full membership was part of the asserted group identity of the Jaycees.

The petitioners here do not object to association with elderly, labor,

low-income and small business people. They merely object to the compulsion to associate. However, if there is no objection to the association, as the Jaycees objected to women as regular members, then petitioners cannot complain when they are compelled to associate with persons with whom they have no objection to associating. The abstract "right" to be free from compulsion, as a voluntary participant in a highly regulated industry, is not a "right" at all, much less one protected by the Federal Constitution.

Even were this Court to determine that petitioners had interposed an objection to the association required by West Virginia Code 16-5B-6a, Jaycees makes it quite clear that this objection is insufficient to afford petitioners

protection under the United States Constitution.

The Court in Jaycees described the sort of association which does not qualify as highly personal: "an association lacking these qualities (of smallness, intimacy) such as a large business enterprise." (parenthetical added) Jaycees, 104 S. Ct. at 3251. A hospital is a large business enterprise, and thus does not enjoy these constitutional protections. In fact, hospitals, being employers, are routinely sued for failure to hire women, blacks and other categories of protected individuals under human rights statutes such as the one in Jaycees. They are thus forced to associate with women, blacks, and others, even though they might prefer otherwise. Hospitals are public

institutions, not private clubs, and their boards are not entitled to the absolute constitutional protection they seek to have this Court impose.

More specifically, the boards of directors of large business enterprises, such as hospitals, have had their freedom of association restricted in several ways, without successful challenge. For instance, in Blue Cross of Iowa v. Foudree, 606 F. Supp. 1574 (S.D. Iowa 1985), the court held that Iowa's statute, requiring that two thirds of the membership of the board of directors of Blue Cross must be composed of subscribers as opposed to providers, does not violate the Due Process Clause. Similarly, West Virginia Code § 33-25-4 pertaining to health care corporations provides that:

> "The board of directors of any corporation organized under this article shall consist of at least seven members, all of whom shall be residents of the State of West Virginia, a majority of whom shall be subscribers to its services, one of whom shall be a person licensed to practice medicine under the laws of the State of West Virginia, one of whom shall be a person connected with the healing arts, and one of whom shall be a member of the general public not connected with any contracting party. The members of the board shall serve without compensation but may be reimbursed for expenses incurred in carrying out their duties as members of the board."

These are but two examples of the prevalent regulations of boards of directors of business enterprises in the health care context. A blanket prohibition on the ability of states to regulate the composition of boards of directors would seriously hamper the regulatory schemes of the states.

III.

THIS COURT EXERCISES ITS DISCRETION NOT TO REVIEW CONSTITUTIONAL ISSUES NOT PREVIOUSLY RAISED IN LOWER FEDERAL COURTS WHEN THERE HAS BEEN NO SUBSTANTIAL CHANGE IN THE CONSTITUTIONAL ISSUE RAISED.

Petitioners raise the constitutional issue of corporate free speech for the first time before this Court. The petitioners could have raised this issue at the United States District Court or the United States Court of Appeals for the Fourth Circuit, but did not do so. Petitioners give no reason for their failure to raise this issue below.

This Court could note sua sponte that the United States Court of Appeals for the Fourth Circuit rendered their decision in the case at bar on February 27, 1986, whereas this Court decided Pacific Gas & Electric, supra,

on February 25, 1986, and could conclude that petitioners did not raise this constitutional issue of corporate free speech because they could not have known of the defense prior to the announcement of the decision in Pacific Gas & Electric.

Respondent notes, however, that the petitioners are sophisticated litigants who knew of this constitutional argument, even though Pacific Gas & Electric had not been decided until after the case at bar had been argued before the United States Court of Appeals for the Fourth Circuit, and, thus, petitioners by not raising this issue below have waived it. It can be asserted that petitioners knew of this argument, because, as the numerous citations in the Pacific Gas & Electric opinion

demonstrate, there is a rich history of decisions upholding the corporate right of free speech, most notably First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978), and Consolidated Edison Company v. Public Service Commission of New York, 447 U.S. 530 (1980). Pacific Gas & Electric was not a case of first impression. Petitioners knew or should have known of Bellotti and Consolidated Edison. However, they failed to raise the issue of corporate free speech at the United States District Court or the Fourth Circuit Court, even though they raised a multitude of other constitutional objections.

> "No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right * * * ." Michel v. Louisiana,

350 U.S. 91 at 99 (1955), quoting Yakus v. United States, 321 U.S. 414 at 444 (1943).

"[E]ven constitutional objections may be waived by a failure to raise them at a proper time," Curtis Publishing Company v. Butts, 388 U.S. 130 at 143 (1967), if it is a known right, thus precluding the assertion of the objections on appellate review.

Even if this Court concludes that Pacific Gas & Electric was a change in constitutional law rather than merely an extension of previous cases, and further concludes that it is a change which petitioners could not have contemplated, this Court has adopted the position that issues not raised below are waived unless there is a substantial change in the law or extraordinary circumstances.

> "It is only in exceptional cases coming here from the

> federal courts that questions not pressed or passed upon below are reviewed." Youakim v. Miller, 425 U.S. 231 at 234 (1976), quoting Duignan v. United States, 274 U.S. 195 at 200 (1927).

In Youakim, the United States Department of Health, Education and Welfare had completely changed their regulations in the intervening period.

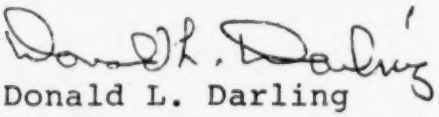
Respondent contends that even if Pacific Gas & Electric is a change in the law, it is not such a substantial change in the law that this Court should ignore petitioners waiver of this objection.

CONCLUSION

For the reasons set forth above, Respondent respectfully requests that this Court let stand the decisions of the courts below and decline to issue a writ of certiorari to review the

judgment of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,



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AFFIDAVIT OF FILING AND
CERTIFICATE OF SERVICE

I, Donald L. Darling, hereby certify that I am Counsel of Record and a member of the Bar of this Court and that, to my knowledge, the Brief of the Director of the West Virginia Department of Health, David K. Heydinger, M.D., was properly filed with the Clerk of this Court and served on Petitioners' Counsel of Record on June 27, 1986, within the time permitted for the same. Such filing and service were accomplished in that, to my knowledge, the document was deposited at the United States Post Office, Charleston, West Virginia, with first-class postage prepaid, forty copies of the Brief of the Director of

the West Virginia Department of Health, David K. Heydinger, M.D., properly addressed to the Clerk of this Court, as well as three copies of same properly addressed to each of the following at his post office address: Richard L. Epstein, Esquire; Linda A. Tomaselli, Esquire; and Ida S. Rothschild, Esquire (Counsel of Record for Petitioners); American Hospital Association, 840 North Lake Shore Drive, Chicago, Illinois 60611.

Respectfully submitted,

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June 27, 1986

State of West Virginia,

Kanawha County

Taken, subscribed and sworn to before me this 27TH day of June, 1986.

Linda F. Barker
Notary Public

My commission expires July 19, 1994.